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IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 388

WILLIAM BATTLE,

Petitioner,

vs.

ESTATE OF EDWARD A. GALLAGHER, LOTTIE GALLAGHER, TRUSTEE, ARTHUR A. GALLAGHER, INDIVIDUALLY AND T/A E. A. GALLAGHER & SONS,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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The Daily Record Co., Baltimore 3, Md.

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Respondents accept Petitioner's Citations to Opinion Below, and, except as subsequently noted, his Statement; but Respondents do not agree that the jurisdiction of this Court is properly invoked, or that the question presented is as stated, or that the case involves any right under the statutes of the United States.

JURISDICTION

In the interest of accuracy, it should be pointed out that no mention was made of the ICC regulation referred to in Petitioner's brief, nor of the case of American Trucking Association, Inc. vs. U. S., 344 U.S. 298, 73 S. Ct. 307, 97 L. Ed. 337, either in the trial court or the brief filed on behalf of the Petitioner in the Court of Appeals of Maryland.

The first occasion on which Counsel for the Petitioner made any reference whatever to the ICC regulation on which they now rely, or to the decision of this Court in American Trucking Association, Inc. vs. U. S., supra, was during the argument in the Court of Appeals of Maryland. At that time, Petitioner's Counsel admitted that said regulation was not in force and effect when this accident occurred, on January 22, 1953, and stated that it was put into force and effect in September of 1953. As shown hereafter, the ICC regulation in question has never been put into force and effect by the Interstate Commerce Commission, although the Commission's power and authority to do so was upheld by this Court in American Trucking Association, Inc. vs. U. S., supra, from which this Court denied a petition for re-hearing on March 9, 1953.

QUESTION PRESENTED

There is no question presented for this Court's determination. Petitioner's brief is confusing because it proceeds throughout as though there were in full force and effect at the time of the happening of this accident, a regulation of the Interstate Commerce Commission, forbidding the leasing of equipment by an ICC carrier for a period of less than thirty days.

Although the Interstate Commerce Commission has considered putting such a regulation into effect since May 8, 1951, it has never done so. A complete history of this regulation appears hereafter under Argument.

ARGUMENT

A casual reading of Petitioner's brief would give the impression that at the time of the happening of this accident, on January 22, 1953, there was in force and effect a regulation of the Interstate Commerce Commission, forbidding

the leasing of hauling equipment by ICC carriers for a period of less than thirty days; and that since the lease involved in this case was for less than thirty days, Petitioner's rights under said regulation had been violated. There is no hint in said brief that said regulation has never been put into force and effect by the Interstate Commerce Commission. On the contrary, the petition charges that the lease by Respondents of less than thirty days is "improper" and that said regulation "*requires*" that no lease be for a period of less than thirty days. It is further stated that the alleged evils of trip leasing "were eliminated" by said ICC regulation. The Court of Appeals of Maryland is charged with "disregarding" this regulation; and it is also stated: "The Federal Government *having acted* in the field of regulating 'trip leases' in interstate commerce, it is incumbent upon the States to apply the regulations" (Petitioner's brief, pp. 4-5). (Emphasis supplied.)

The facts with reference to the regulation upon which Respondents rely, are as follows:

The correct reference to this ICC regulation is 207.4(a)(3) (16 F.R. 4804).

The provisions of said regulation have been printed in our appendix, Infra, p. 8. The order of the Interstate Commerce Commission under which this regulation was first "prescribed" is dated May 8, 1951; and, under its provisions, said regulation was to become effective on August 1, 1951. The regulation did not go into effect on August 1, 1951, however, and has never gone into effect because of subsequent orders postponing the same. The dates of the orders, the postponements involved, and the references thereto in the Federal Register, are as follows:

Date of Order	*Postponement of Effective date*	*Appearing on Federal Register*
May 8, 1951	To August 1, 1951	16 F.R. 4804
July 20, 1951	" September 1, 1951	16 F.R. 7329
August 17, 1951	" November 1, 1951	16 F.R. 8469
October 8, 1951	" December 1, 1951	(*)
November 20, 1951	" February 1, 1952	16 F.R. 12097
January 23, 1952	" April 1, 1952	17 F.R. 927
March 20, 1952	To become effective upon further order of the Commission.	17 F.R. 2729
May 18, 1953	To September 1, 1953	18 F.R. 3023
August 14, 1953	" March 1, 1954	18 F.R. 4929
November 30, 1953	" March 1, 1955	18 F.R. 7800
February 2, 1955	" March 1, 1956	20 F.R. 921
October 6, 1955	Preceding order of February 2, 1955 was vacated to make said regulation become effective December 1, 1955.	20 F.R. 7905
November 15, 1955	Effective date was postponed again to March 1, 1956.	20 F.R. 8639
January 23, 1956	To July 1, 1956	21 F.R. 695
June 18, 1956	Effective date "postponed until further order".	21 F.R. 4628

(*) Through oversight, this order was not published in the Federal Register.

In addition to the Commission's order of May 8, 1951, which first "prescribed" this regulation, there are printed in the appendix hereof the Commission's subsequent orders of May 18, 1953 (pp. 8, 9), and June 18, 1956 (pp. 9, 10). The order of May 18, 1953, is included because it shows that all of the litigation involving these regulations was terminated on March 9, 1953, when this Court denied a petition for rehearing in the case in American Trucking Association, Inc. vs. U. S., supra. From that time until this, the Interstate Commerce Commission has had full power and authority to put Regulation 207.4(a)(3) into force and effect

at any time; but it has never done so. On the contrary, in this last order, dated June 18, 1956, the Commission has seen fit to postpone the effective date of Regulation 207.4(a)(3) indefinitely.

By the Act of August 3, 1956, 84th Congress, Second Session, Chapter 928, Public Law 957, the Interstate Commerce Commission was given express authority to regulate leases of this character, except in the case of vehicles hauling agricultural commodities. (U.S. Code Congressional and Administrative News, 1956 Issue No. 15, September 5, 1956, pp. 5815, 5816). Beginning at page 6174 of said issue, House Report No. 2425 with respect to said Act is set out in full. At pages 6177, 6178 thereof, the Report states:

> "PRESENT STATUS OF ICC LEASING ORDER
>
> The order of the Interstate Commerce Commission dated May 8, 1951, was scheduled to take effect on August 1, 1951. However, in response to the strong objections of agricultural interests, certain motor carriers and other parties, and in response to repeated requests of committees of the Congress, the Interstate Commerce Commission has found it necessary to postpone repeatedly the effective date of, and amend, that portion of the order dealing with the 30-day minimum rule on trip leasing. At the present time, the order, as amended, is scheduled to become effective on July 1, 1956."

Since said House Report was written, the effective date of said order of the Interstate Commerce Commission dealing with said 30-day minimum rule on trip leasing has been postponed until further order of the Commission (21 F.R. 4628).

It may be that none of the provisions of Regulation 207.4 has ever been put into effect. Some of the orders set out on Page 4 hereof, following the one dated May 18, 1953, affected only Regulation 207.4(a)(3). However, the several orders of the Commission beginning with the original dated May

8, 1951, and through and including the one dated May 18, 1953, were blanket orders postponing the effective date of the entire Regulation 207.4 until September 1, 1953. The accident in this case occurred on January 22, 1953.

Aside from the facts in Petitioner's Statement to which we have referred, the remaining facts have no significance here. We do not wish to enter into a controversy with respect to Petitioner's recital of the other facts, but refer this Court to the decision of the Court of Appeals of Maryland for a fair statement of the law and the facts in this case. While this Court is not interested in the agency question, which the Court of Appeals of Maryland resolved in favor of Respondents, it will be observed that the conclusion reached by the Court of Appeals of Maryland with respect to this issue is in accord with the views of two other highly respected Courts of last resort, namely, the United States Court of Appeals for the Second Circuit, in Costello vs. Smith, 179 F. 2d 715, 16 A.L.R. 2d 954, and the Supreme Court of Ohio, in Simon vs. McCullough Transfer Co., 155 Ohio State 104, 98 N.E. 2d 19.

CONCLUSION

Since the Interstate Commerce Commission has never seen fit to put Regulation 207.4(a)(3) into effect, Petitioner was not deprived of any rights thereunder; and there being no question of a Federal nature presented, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

PART 207 — LEASE AND INTERCHANGE OF VEHICLES

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 8th day of May A.D. 1951.

It appearing, that subsequent to an investigation into the lawfulness of the practice of motor common and contract carriers of property, the Commission, Division 5, by order dated June 26, 1950, prescribed rules and regulations governing the practices of such carriers in the performance of transportation with motor vehicles owned by others, the interchange of vehicles between such common carriers, and the lease of vehicles by any such carriers to private motor carriers and shippers (15 F.R. 4339, July 8, 1950);

It further appearing that by order entered September 5, 1950 (15 F.R. 6125, Sept. 12, 1950), the effectiveness of said regulations was postponed indefinitely;

And it further appearing, that pursuant to order dated September 22, 1950, reopening the proceeding and setting it down for oral argument, such oral argument has been held, and, that after reconsideration by the entire Commission, the Commission, on the date hereof, has made and filed a report on oral argument containing its findings of fact and conclusions thereon, which report is hereby made a part hereof;

IT IS ORDERED, That the following rules and regulations are hereby prescribed to become effective on August 1, 1951:

Sec.

207.1 Applicability.

207.2 Definitions.

207.3 Exemptions.

207.4 Augmenting equipment.

207.5 Interchange of equipment.

207.6 Rental of equipment to private carriers and shippers.

* * * * * *

207.4 AUGMENTING EQUIPMENT. Other than equipment exchanged between motor common carriers in interchange service as defined in §207.5, authorized carriers may perform authorized transportation in or with equipment which they do not own only under the following conditions:

(a) The contract, lease, or other arrangement for the use of such equipment: * * *.

(3) Shall specify the period for which it applies which shall be not less than 30 days when the equipment is to be operated for the authorized carrier by the owner or employees of the owner:

* * * * * *

16 F.R. 4804

PART 207 — LEASE AND INTERCHANGE OF VEHICLES
ORDER AFFIXING EFFECTIVE DATE

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 18th day of May A.D. 1953.

Upon further consideration of the record in the above-entitled proceeding:

It appearing, that on January 12, 1953, the Supreme Court of the United States, in an opinion in American Trucking Assns., Inc., et al. v. United States, et al.; Eastern Motor Express, Inc., et al. v. United States et al.; and Secretary of Agricultural of United States, et al. v. United States, et al., Nos. 26, 35, and 36, October Term, 1952, reported in American Trucking Assns. v. United States, 344 U.S. 298, affirmed judgments entered respectively by the United States Dis-

trict Court for the Northern District of Alabama, in American Trucking Associations, Inc. v. United States, 101 F. Supp. 710, and the United States District Court for the Southern District of Indiana in Eastern Motor Express, Inc. et al. v. United States, 103 F. Supp. 694, which judgments denied permanent injunctions against the enforcement of the order heretofore entered in said proceedings prescribing rules and regulations;

And it further appearing, that on March 9, 1953, the Supreme Court denied a petition for rehearing in the proceedings first above cited, and that on March 13, 1953, the injunction against enforcement of the said order pending appeal, theretofore entered by the United States District Court for the Southern District of Indiana was duly dissolved;

It Is Ordered, that the order entered in said proceeding on May 8, 1951, which was subsequently modified to become effective upon further order of the Commission, following the termination in the United States Supreme Court of the appeal decided in American Trucking Assns. v. United States, 344 U.S. 298, be, and the said order of May 8, 1951, is hereby, modified so as to become effective September 1, 1953.

18 F.R. 3023.

Part 207 — Lease and Interchange of Vehicles

At a general session of the Interstate Commerce Commission, held at its office in Washington, D.C., on the 18th day of June, A.D. 1956.

It appearing that by orders entered herein on February 2, 1955, November 15, 1955, and January 23, 1956, certain sections, or parts of certain sections of the rules prescribed in the above-entitled proceeding by order of May 8, 1951, as subsequently amended, or the applicability of the rules, or sections thereof, to specified groups of authorized carriers, are to become effective on July 1, 1956;

It further appearing that there is pending before the Congress a Bill, S. 898, to amend the Interstate Commerce Act with respect to the authority of this Commission to regulate the use by motor carriers (under leases, contracts, or other arrangements) of motor vehicles not owned by them, in the furnishing of transportation;

And it further appearing that it would be undesirable to the public interest if the said sections or parts of sections were to become effective while the Congress is considering whether to approve legislation dealing with the subject;

IT IS ORDERED: That the effective date of the following provisions of the order entered in this proceeding on May 8, 1951, as subsequently modified, be, and it is hereby, postponed until further order:

(1) The provision of 207.4(a)(3) which requires that any contract, lease, or other arrangement for the use of equipment shall specify a period "which shall not be less than 30 days"; * * *.

21 F.R. 4628